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No. 85-139

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*,
Petitioners,
v.
ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP AND THE AMERICAN IRON AND STEEL INSTITUTE IN OPPOSITION

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QUESTIONS PRESENTED

Whether, if fairly characterized, any question arising from the decision below warrants review by this Court on certiorari:

1. Whether it was prejudicial error for the court of appeals to state that a motion to enforce compliance with a previous mandate can serve concurrently as a petition for review where the court, specifically holding that its mandate to the Federal Energy Regulatory Commission (FERC) had been circumvented, entered a judgment specifically granting the enforcement motion as such.

2. Whether, even assuming that the court of appeals did treat an enforcement motion concurrently as a petition for review under Section 506 of the Natural Gas Policy Act, 15 U.S.C. § 3416, the procedural requirements for such review were offended where (a) the agency order involved was already an order on rehearing of the very matter at issue and (b) that order demonstrated on its face the agency's disobedience of the court of appeals' previous mandate.

3. Whether a grant of an enforcement motion, limited to rejection of a collateral attack on the court's previous mandate requiring refunds, and causing no prejudice to petitioners' rights subsequently to pursue review of wholly distinct and severable issues, offended any considerations of judicial economy.

4. Whether the court of appeals, by vacating a FERC order found to be in violation of the court's previous mandate requiring refunds, deprived petitioners of any due process rights where (a) petitioners conceded that refunds were required; (b) petitioners were afforded full opportunity to address the merits and did so; (c) all other issues of interest to petitioners were fully preserved for subsequent review in the same court, and (d) the funds which petitioners sought to obtain via these proceedings have since been ordered to be paid to them in full by September 30, 1985?

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BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP AND THE AMERICAN IRON AND STEEL INSTITUTE IN OPPOSITION

Respondents the Process Gas Consumers Group and the American Iron and Steel Institute respectfully request that this Court deny the Petition for Writ of Certiorari sought herein to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in Nos. 81-1690, *et al.*[1]

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[1] Respondent, the Process Gas Consumers Group ("PGC"), is an association of industrial consumers of natural gas. PGC is participating in this proceeding through an *ad hoc* committee, the members of which are: Armco Inc., Bethlehem Steel Corporation, Borg-Warner Corporation, Carpenter Technology Corporation, Cone Mills

STATEMENT OF THE CASE

Contrary to the broad characterization offered by petitioners ("Producers"), this case does not involve any sweeping changes in the relationships among federal agencies, reviewing courts, and the parties before them. (*See* Petition at 9.) Rather, this case involves only a series of ordinary (though admittedly protracted) regulatory and judicial proceedings, culminating in a court of appeals' decision to enforce its own mandate by vacating an agency order that clearly violated that mandate and reinstating an agency order that complied with it. Among the extraordinary facts leading up to that decision, the following are key:

Corporation, General Motors Corporation, LTV Steel Company, Owens-Corning Fiberglas Corporation, and Owens-Illinois, Inc.

Respondent, the American Iron and Steel Institute ("AISI"), is a trade association representing the steel industry. The corporate members of AISI are: The Algoma Steel Corporation, Limited, American Cast Iron Pipe Company, Armco Inc., Atlantic Steel Company, Atlas Steels, The Babcock & Wilcox Company, Bethlehem Steel Corporation, Carpenter Technology Corporation, CCX, Inc., The Cleveland-Cliffs Iron Company, Columbia Tool Steel Co., Compania Siderugica Huachipato, S.A., Copperweld Corporation, Dofasco, Inc., Electralloy Corporation, A. Finkl & Sons Co., Georgetown Industries, Inc., Green River Steel Corporation, Harsco Corporation, Hi Specialty America, HYSLA, S.A., Ingersoll Steel, Inland Steel Company, Interlake, Inc., International Metals Reclamation Co., Inc., IPSCO, Inc., Jessop Steel Company, Earle M. Jorgensen Company, Laclede Steel Company, Lone Star Steel Company, LTV Steel Company, Lukens, Inc., The M.A. Hanna Company, McLouth Steel Products Corporation, National Steel Corporation, New Jersey Steel Corporation, North Star Steel Company, Northwestern Steel and Wire Company, Oglebay Norton Company, Oregon Steel Mills, Pickands Mather & Co., Raritan River Steel Company, Rhode Island Forging Steel, Inc., Rome Strip Steel Company, Inc., Sandvik, Inc., Sharon Steel Corporation, Sharon Tube Company, Shenango Incorporated, SIDBEC-DOSCO, Inc., Stelco, Inc., Sydney Steel Corporation, Teledyne Vasco, The Timken Company, United States Steel Corporaiton, Valley Mould and Iron Company, Weirton Steel Corporation, Wheatland Tube Company, and Wheeling-Pittsburgh Steel Corporation.

(1) that a final D.C. Circuit decision ("*INGAA I*")[2] imposed upon Producers and others a large refund obligation *to* their customers; this obligation to make "Btu refunds" arose from overcharges collected during the period December 1978-December 1983 due to certain illegal pricing methods;

(2) that previously, as a result of a wholly unrelated FERC proceeding (as to which appellate review was then still pending),[3] Producers and others had become eligible to receive certain payments *from* their customers for eligible production costs; such payments were to be made to them in equal installments over a 22-month period from February 1983 through December 1984;

(3) that, although no stay was ever issued of FERC's order that those production cost payments be made, many pipelines unilaterally decided not to make the required payments to their suppliers during the 22-month period allowed; and

(4) that, in the FERC proceeding on remand from *INGAA I*, Producers saw a completely unrelated pool of dollars from which they hoped finally to obtain payment of the production debts allegedly owed them; thus, they urged FERC to allow them to offset their *INGAA I* obligations to their pipeline customers against those customers' unrelated production debts to them. Other parties vigorously opposed this attempt by producers and pipelines to settle their production cost disputes with refund monies belonging not to the pipelines, but to those consumers who had been overcharged in the past.

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[2] *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1615 (1984) ("*INGAA I*").

[3] FERC Order No. 94-A, 48 Fed. Reg. 5152 (1983), *aff'd in part, vacated in part, and dismissed in part, Texas Eastern Transmission Corp. v. FERC*, No. 83-4390 (5th Cir. Aug. 19, 1985).

In its Order No. 399,[4] the FERC correctly rejected the Producers' requests that it authorize offsets, instead ordering that the required *INGAA I* refunds be made generally via lump sum cash payments. In so doing, FERC noted that to allow offsets could undermine case-by-case production cost disputes, further complicate an already difficult process, frustrate pending Fifth Circuit review of production cost issues (*see* note 3 *supra*), and "prevent the Btu refunds from reaching as many of the customers actually overcharged as possible." (Petition App. at 27a-28a).

Subsequently, however, upon rehearing of the offset issue, a bare majority of the FERC Commissioners issued Order No. 399-A, 49 Fed. Reg. 46,353 (1984) (Petition App. at 81a-126a), which, as the D.C. Circuit correctly characterized it below, "abruptly reversed [FERC's] position on offsets . . . without addressing the weighty rationale behind its earlier Order [399]." *Interstate Natural Gas Ass'n of America v. FERC*, 756 F.2d 166, 169 (D.C. Cir. 1985 (*"INGAA II"*) (Petition App. at 9a). Although certain Producers immediately raced to file appeals in the Fifth Circuit with respect to Order 399-A's treatment of other non-offset-related issues,[5] four

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[4] 49 Fed. Reg. 37,735 (1984) (to be codified at 18 C.F.R. Part 154). *See also* Appendix B to Producer's certiorari petition, at 16a-80a. The appendices to Producers' petition are hereinafter cited as "Petition App. at —a" and "Petition Supp. App. at —b."

[5] *E.g., Mobil Oil Exploration & Producing Southeast Inc. v. FERC*, No. 84-4775 (5th Cir. filed Nov. 20, 1984) (*"MOEPSI v. FERC"*).

It bears noting that, when Order 399-A was issued, Producers urged "that no further rehearings should be permitted" by FERC, asserting their belief that the agency had already "afforded all parties a full opportunity to express their positions and arguments in support thereof. . . ." Conditional Request for Rehearing of Indicated Producers, filed Dec. 20, 1984, in FERC Docket Nos. RM84-6-003, *et al.*, at 3, *citing Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom. California Co. v. FPC*, 426 U.S. 941 (1976).

of the Respondents herein (including PGC and AISI) concluded that ordinary judicial review would be inapposite to, and an inadequate remedy for, their concerns regarding FERC Order 399-A. Those concerns were not with the details of the agency order (*cf.* Producers' concern with the order's treatment of certain working interest owners' obligations), but rather went to the threshold question of the agency's compliance *vel non* with the *INGAA I* mandate. Such being the case, the Respondents sought not "judicial review" of Order 399-A but, instead, to bring to the attention of the *INGAA I* court the single fact that its mandate was being disobeyed on remand. Respondents thus requested the D.C. Circuit to invoke its inherent jurisdiction in aid of its prior mandate rather than stand by helplessly as Producers first persuaded FERC to reverse itself and circumvent that mandate and then raced to ask another court of appeals to interpret that mandate.

Producers submitted detailed written responses to each of the Respondent's enforcement motions in the court of appeals below, not only challenging Respondents' reliance on the enforcement motion procedure, but also addressing the merits of whether offsets in fact operated to frustrate the court's mandate.

Upon full consideration of the issue and the arguments thereon, the D.C. Circuit in *INGAA II* confirmed that an "inexorable" requirement of its *INGAA I* mandate had been to "remedy the effects of past use of the improper pricing method at the earliest possible moment." 756 F.2d at 168. (Petition App. at 7a). Accordingly, it rejected Producers' arguments[6] that the offset scheme

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[6] Response of Indicated Producers To Motion of Petitioner Associated Gas Distributors for Order Directing Compliance With Mandate, filed Dec. 3, 1984, in *Interstate Natural Gas Ass'n of America v. FERC*, Nos. 81-1690, *et al.* (D.C. Cir.) at 3, 5, 7-8, 10.

modified only the *method* of payment, but not the *amount*, of the required refunds, holding:

> [P]ermitting producers to offset their refund obligations would bring delay and confusion into an already complex area. Moreover, the *principles of law and the customers involved in the refund arrangement are far from identical to those implicated in the Section 110 [production] costs proceedings. . .* Involving disparate issues in a matter on appeal to another court can only complicate, delay, and *obfuscate the refunds at issue here.*
>
> The law requires the ordering of refunds at the earliest possible moment. That moment has come and gone.[7] The offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, *circumventing our mandate* in [*INGAA I*] and the clear instruction of the Supreme Court in [*FPC v.*] *Tennessee Gas* [*Transmission Co.*, 371 U.S. 145 (1962)].

INGAA II, *supra*, 756 F.2d at 171 (emphasis added) (Petition App. at 12a).[8]

While declaring that the "availability of mandamus to confine FERC to the terms of this court's mandate is fully supported by precedent", 756 F.2d at 169 (Petition App. at 9a), the court of appeals nevertheless reasoned that it did not need to address directly the propriety of mandamus in this specific case since direct review and

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[7] As of the March 1985 date of *INGAA II*, it had been more than a year and a half since the August 1983 *INGAA I* decision and well more than a year since the *INGAA I* mandate issued in December 1983.

[8] Circuit Judge Scalia concurred in the judgment on grounds that the offset scheme violated the statutory prohibition against retroactive ratemaking. (Petition App. at 15a). Although Judge Scalia subsequently replaced his concurring opinion with a dissent addressing only the propriety of the procedure followed (Petition App. at 133a-135a), he made no effort to recant his previous firm conclusion that such offsets are *prohibited as a matter of law.*

mandamus "may be sought in the alternative", 756 F.2d at 170 (Petition App. at 10a), and since the parties to the case had already "amply addressed the merits". *Id.* (Petition App. at 11a). However, notwithstanding its statement that Respondents' motions to enforce the mandate may be treated "as a petition for review", *id.*, the judgment issued by the court of appeals in the case specifically ordered "that the motion by Associated Gas Distributors to direct compliance with the Court's mandate herein is granted. . ." (Petition App. at 131a).

Producers' suggestion for rehearing *en banc* was circulated to the full D.C. Circuit and the same was denied with no participating member of the court requesting the taking of a vote thereon. (Petition App. at 136a).

On August 19, 1985, the Fifth Circuit issued its decision on appeal from FERC Order No. 94-A (*see* note 3 *supra*) confirming, wholly apart from any offset issue, the general validity of production cost debt obligations. Having thus disposed of the cases involving the debts against which the unrelated refund offsets had been proposed, the Fifth Circuit simultaneously ordered transferred to the D.C. Circuit both Btu refund cases, *i.e.*, *MOEPSI v. FERC*, *supra* (Producers' appeal of non-offset-related issues arising from FERC Order Nos. 399 and 399-A) and *Mobil Producing Texas & New Mexico Inc. v. FERC*, No. 85-4485 (5th Cir. filed July 24, 1985) (Producers' appeal of the FERC Order (No. 399-B, 50 Fed. Reg. 30,141 (1985), Petition Supp. App. at 1b-9b) implementing the D.C. Circuit's anti-offset mandate in *INGAA II*.)

REASONS FOR DENYING THE WRIT

I. The D.C. Circuit's Reasoning That An Enforcement Motion Could Be Treated Concurrently As A Petition For Review Was, If Error At All, Merely Harmless Error Since All Applicable Procedural Requirements Were Met And No Party's Due Process Rights Were Violated.

The judgment entered by the court of appeals below (Petition App. at 131a) specifically granted motions to enforce its previous mandate notwithstanding the statement in the court's opinion that it "need not enter the debate over the propriety of resort to mandamus in this case" and its discussion of the availability of direct review and mandamus in the alternative. 756 F.2d at 169-70. (Petition App. at 9a-11a.)[9] Under the unusual circumstances involved—in which the court of appeals specifically concluded that the FERC was not only circumventing the court's 15-month-old mandate but also defying the teaching of this Court concerning the prompt ordering of refunds to consumers[10]—the court's exercise of its inherent authority to construe and enforce its mandate was indeed justified. Producers' hyperbolic suggestion (Petition at 8-9) that the court's action below will open the floodgates to use of enforcement motions in lieu of petitions for review is but a bugbear, ignoring the strictly limited factual and legal context in which that action was taken. While Producers' vision of a world of procedural chaos may raise questions of academic interest, this case presents no basis to decide them. Nor is there, beyond mere *ipse dixit*, any credible suggestion that the unusual

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[9] Producers *incorrectly* represent in their Petition herein that the court of appeals "[saw] that mandamus did not properly lie." (Petition at 21.) No such decision was reached.

[10] *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962), quoted below at 756 F.2d at 170-71. (Petition App. at 11a-12a).

context in which this case arose lends itself to repetition. The D.C. Circuit gave full consideration to the specific issue presented and decided it correctly in the particular circumstances presented; that court's exercise of its clear discretion to enforce its mandate without prejudicing direct review of other aspects of FERC Order 399-A does not warrant a grant of certiorari.

Moreover, even if, notwithstanding its judgment specifically granting enforcement motions, the D.C. Circuit intended to treat the motions before it in part as petitions for review, that intention does not rise above the level of harmless error.[11]

A. Producers err in insisting that, because no applications for rehearing were first filed and denied by FERC, the enforcement motions below could not have been treated concurrently as petitions for review. The rehearing requirement is intended only to give an agency an initial opportunity to correct its errors before an appeal is taken and to give the reviewing court the benefit of the agency's analysis. *Ecee, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980). But Order No. 399-A was *itself an order on rehearing of the offset issue*, and, as Producers themselves recognized at that time, all parties had by then had "full opportunity to express their positions and arguments in support thereof." *See* note 5 *supra*. The purposes of the statute having thus been satisfied, there was no need for further rehearing prior to judicial review. *See Public Serv. Comm'n v. FPC*, 543 F.2d 757, 774-75 n.116 (D.C. Cir. 1974) ("Surely a modification of a prior administrative decision o[n] rehearing does not generate a need to request another

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[11] *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937): "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *See also* 28 U.S.C. § 2111.

rehearing where the litigant has already presented his point to the Commission for decision. . . .")[12]

B. Producers similarly err in asserting that the D.C. Circuit was required to have before it the entire FERC record on remand. Given the limited enforcement relief sought and granted, the court of appeals needed nothing more before it than its own *INGAA I* mandate and FERC's order purporting to implement it. Even so, although the court itself was certainly the best interpreter of the requirements of its own mandate, it did *also* have the benefit of all parties' views on the merits of the offset issue.[13] No further record was needed to permit the court of appeals to take the limited step of exercising its jurisdiction to enforce its mandate. Certiorari is not warranted to review the court of appeals' discretion concerning the adequacy of the evidentiary record before it to enforce its own mandate—and certiorari is certainly not warranted where Producers had full opportunity to cite to the court any portion of the record deemed relevant.

C. The court of appeals had clear jurisdiction to enter its judgment below,[14] and its doing so did not result in

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[12] Although, in the decision cited in the text, the petitioner itself had applied for rehearing of the agency's previous order, the court of appeals' reasoning was more broadly applicable:

> The obvious purpose of the statutory [rehearing] requirements is to afford the Commission the first opportunity to consider, and perhaps dissipate, issues which are headed for the courts. . . . We have consistently held that our authority to review actions of the Commission is unaffected by events—even irregularities—which do not hamper attainment of that objective.

Id. (citations omitted and emphasis added).

[13] In fact, Producers utilized the *two* opportunities afforded them to address those merits prior to the panel's decision.

[14] Since no record had yet been filed in any other court, no court yet enjoyed *exclusive* jurisdiction to review Order 399-A, *see* 15 U.S.C. § 3416(a)(4). Certainly no court could at that time claim

any "piecemeal review" offensive to considerations of judicial economy.[15] Respondents did not seek, and the D.C. Circuit below did not grant, comprehensive judicial review of Order 399-A. The D.C. Circuit was fully aware that Producers had already sought that type of review in the Fifth Circuit, *see* 756 F.2d at 169 (Petition App. at 9a), and the judgment it entered in *INGAA II* was carefully limited to a single threshold issue—doing nothing to prejudge the issues raised by Producers in their Fifth Circuit appeal.[16] Judicial review of Producers' issues may

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a valid right to deprive the D.C. Circuit of jurisdiction to enforce its own mandate—a fact implicitly recognized by the Fifth Circuit's decisions to defer the filing of the record until the completion of the D.C. Circuit's threshold consideration of FERC's compliance with its previous mandate. (*See* Petition App. at 137a, 138a). Such deference to pending proceedings in a sister court of appeals, which had already issued a mandate in an earlier phase of the same matter, was fully consistent with sound practice and the goal of maintaining decisional continuity. *See Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972).

[15] Cases cited by Producers on this point (Petition at 16) have no relevance to the instant proceeding. The court's concern in *Cities of Anaheim and Riverside v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982), was that review of an order only initially accepting an application for filing would invade the administrative province, particularly where the petitioner would later have an opportunity to address the merits before the agency. Similarly, *Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1982), involved only an interlocutory order, review of which would have invaded the administrative province and offended judicial economy. In contrast, in the instant case, all parties have been fully heard and the Commission's order was a final one.

[16] According to pleadings filed by Producers originally in the Fifth Circuit, their appeals from FERC Order Nos. 399 and 399-A raised two issues concerning (1) whether, *apart* from any offset, FERC used the correct formula to calculate the amount of producers' individual refund obligations and (2) certain working interest owner refunds. *See* Producers' "Motion Under The All Writs Act For An Emergency Stay", etc., filed July 26, 1985, and "Reply of Producers In Support of Motion", etc., filed August 13, 1985, both in *MOEPSI v. FERC, supra*, at pp. 11-14 and 20-23, respectively.

proceed just the same as it would have had *INGAA II* not been issued since, as Producers emphasized to the court of appeals below, they have "never argued that they did not have to make refunds." [17]

Moreover, since Producers' requests for stays of their Btu refund obligations were denied by the FERC (on May 1, 1985), by the D.C. Circuit (on May 20, 1985), and by Chief Justice Burger as Circuit Justice for the District of Columbia Circuit (on June 3, 1985), their obligation to make refunds must be met by the *August 30, 1985 deadline* prescribed in FERC Order 399-B. (Petition Supp. App. at 7b). This too confirms the fact that Producers' appeals on non-offset issues will be heard in the very same posture as if *INGAA II* had never been issued: that is, the Btu refunds will have been paid [18] subject only to potential recalculation and partial repayment in the event of a D.C. Circuit order reversing FERC on other issues raised by Producers in the appeals originally filed in the Fifth Circuit.

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[17] "Petition of Indicated Producers for Rehearing and Suggestion for Rehearing *En Banc*," filed March 8, 1985, at 13. *See also* "Response of Indicated Producers To Motion of Petitioner Associated Gas Distributors For Order Directing Compliance With Mandate," filed Dec. 3, 1984, in *INGAA v. FERC*, Nos. 81-1690, *et al.* (D.C. Cir.) at 8, where Producers twice conceded that refunds were required by *INGAA I*. Nevertheless, in their certiorari petition to this Court, Producers felt free to contradict directly those prior statements. (Petition at 22).

[18] Producers have consistently argued that the Order 399-A offset procedure changed only the "method" of refund payment, not the amount of the refunds. *See, e.g.*, Petition at 4, 17. Under that theory, therefore, Producers cannot be heard now to complain that, but for *INGAA II*, they would not have been required to "pay" their refund obligations prior to completion of the pending proceedings transferred from the Fifth Circuit to the D.C. Circuit. (Order 399-A required all offsets to be completed before January 1, 1985. *See* Petition App. at 88a.)

Thus, Producers have suffered no prejudice due to the D.C. Circuit's decision in *INGAA II* merely to enforce its *INGAA I* mandate pending the Fifth Circuit's anticipated review of other issues.[19] No considerations of judicial economy have been offended. To the contrary, even prior to the Fifth Circuit's recent transfer to the D.C. Circuit of the appeals from FERC Order Nos. 399, 399-A and 399-B, the interests of judicial economy were *advanced* by the D.C. Circuit's decision in *INGAA II* to confirm the scope of its previous mandate as a *threshold* matter, *i.e.*, before the agency record was filed in the Fifth Circuit and before that court began an unnecessarily broad review of the issues presented to it. Those interests of judicial economy were indeed promoted by confining the anticipated Fifth Circuit proceedings to new issues arising on remand from *INGAA I* and relieving that court from having to review issues previously decided by a sister court of appeals. *A fortiori*, now that those review proceedings have been transferred to the D.C. Circuit, the judicial economy issue is even less apposite, if not moot.

II. The Court Of Appeals Did Not Intrude On FERC's Discretionary Authority.

Finally, Producers have presented to this Court the question of whether, even if the procedure followed *was* proper, the D.C. Circuit below impermissibly intruded upon FERC's discretion. (Petition at i, 21). While that claim may be of interest to the private parties to this case, the specific question presented is hardly one of

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[19] To the extent that Pitts Oil Company, not a party to the proceeding below, may raise in the now-transferred Fifth Circuit proceedings "the question of whether refunds should have been ordered by FERC at all" (Petition at 17), its efforts may be seen as a bald collateral attack on the D.C. Circuit's 1983 decision in *INGAA I*. Producers' careful distancing of themselves from that position (*id.*) suggests their recognition of that fact.

broader public interest or an appropriate one for this Court's review on certiorari.[20]

Moreover, contrary to Producers' view, the court of appeals below did *not* simply substitute its discretion for that of FERC. The offset procedure, pressed upon FERC by producers (and by pipelines eager to settle their debts to producers with money belonging to consumers), affected not merely *how* refunds would be made, but *whether* those refunds would ever be enjoyed by those pipeline customers who were originally overcharged under the rules invalidated in *INGAA I*. Making such refunds was not simply a matter of FERC discretion. Rather, it was a result *compelled as a matter of law* both (1) by the requirements of the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, that gas prices charged by producers not exceed maximum prescribed levels, and (b) by this Court's requirement that refunds be implemented expeditiously. *FPC v. Tennessee Gas Transmission Co.*, *supra*. *INGAA II* did no more than enforce those requirements.

Thus, neither FERC's discretion nor its expertise were intruded upon below. Rather, after the agency's 15-month delay in implementing the *INGAA I* mandate, the D.C. Circuit had a legal responsibility to order—as an "inexorable" consequence of that mandate—that FERC "remedy the effects of past use of the improper pricing method at the earliest possible moment." *INGAA II*, *supra*, 756 F.2d at 168. (Petition App. at 7a). In-

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[20] Not a single member of the D.C. Circuit (including Judge Scalia) voted to grant rehearing of this issue *en banc*, indicating that no member of the court of appeals considered the proceeding to involve "a question of exceptional importance." Fed. R. App. P. 35(a). *A fortiori*, then, this is not a matter warranting certiorari; it is well settled that certiorari jurisdiction is not conferred "merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

deed, rather than substituting its judgment for FERC's, the court of appeals merely re-established the *status quo ante* by vacating Order 399-A, an order which violated the court's mandate, and reinstating Order 399, an order which complied with it. Persuaded by "the weighty rationale behind [FERC's] earlier Order [399]," and finding that the agency's abrupt change of course was without adequate explanation and thus potentially "arbitrary and capricious," the court simply left the agency's *own* well-reasoned earlier order in effect. 756 F.2d at 169, 170 (Petition App. at 9a, 11a).

III. The D.C. Circuit's Decision Below Was Both Correct And Fair.

The "offset" scheme was originally proposed by Producers and others as a convenient opportunity to obtain payment of claims wholly unrelated to their *INGAA I* refund obligations to their customers. Notwithstanding such offsets' violation of both the *INGAA I* mandate and the statutory prohibition against retroactive rate increases,[21] FERC reversed itself and permitted offsets because of (a) many pipelines having simply flouted the requirements in FERC Order 94-A that they pay off their production cost debts in equal installments between February 1983 and December 1984, and (b) producers' growing despair of ever being paid those debts. By overturning Order 399-A's authorization of offsets, the D.C. Circuit correctly prohibited FERC from allowing those unrelated production cost claims to "complicate, delay, and obfuscate" the payment of the required Btu refunds to those entitled to them.[22]

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[21] *See* Section 5 of the Natural Gas Act, 15 U.S.C. § 717d; *FPC v. Tennessee Gas Transmission Co., supra,* 371 U.S. at 152-53; *Public Serv. Co. of New Hampshire v. FERC,* 600 F.2d 944, 957-61 (D.C. Cir.), *cert. denied,* 444 U.S. 990 (1979); *Belco Petroleum Corp. v. FERC,* 589 F.2d 680, 687 (D.C. Cir. 1978).

[22] The parties ultimately entitled to the Btu refunds were the gas consumers who were overcharged as early as December 1978

Moreover, as a result of *INGAA II*, FERC not only issued an order (No. 399-B) requiring the payment of all Btu refund obligations by August 30, 1985, but was also motivated to issue an order (No. 94-F, 50 Fed. Reg. 31,347 (1985)) requiring all long-overdue production cost payments to producers to be made once and for all by September 30, 1985. Thus, in the absence of any stay, the payments that inspired the "offset" scheme in the first place will properly have been made within but a few weeks of the date of this brief.

At this point, then, it appears that the result desired by Producers with respect to attempted offsets will shortly be achieved and that the particular procedural road taken by the parties and the courts to get to that point, though perhaps interesting, will clearly be of nothing more than "academic or . . . episodic" interest.[23] Such matters, it is respectfully submitted, do not warrant the exercise of certiorari jurisdiction.

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and ending December 1983. (*See, e.g.*, Order 399, Petition App. at 40a). In contrast, the consumers responsible for paying the production costs allowed under FERC Order No. 94-A were those buying gas during February 1983-December 1984 (or even later).

Thus, although overlapping, the identity and financial interest of the two groups of consumers downstream of the pipelines were far from identical. By disapproving offsets, therefore, the court of appeals kept producers and pipelines from agreeing to reduce the refunds owed ultimately to the former group of consumers by the amount of production costs owed ultimately by the latter group of consumers.

[23] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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